IN THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO. 3D19-1362
LOWER CASE NO. 19-06869 CA (15)

JAMES ERIC MCDONOUGH,

Plaintiff/appellant,

v.

CITY OF HOMESTEAD, ET AL.,

Defendants/appellees.

INITIAL BRIEF OF DR. JAMES ERIC MCDONOUGH

ON APPEAL FROM A FINAL ORDER ENTERED IN THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS……..…..i

TABLE OF CITATIONS…….……iii

ABBREVIATIONS USED IN THIS BRIEF……...vi

INTRODUCTION…….1

STATEMENT OF THE CASE AND FACTS…….……..1

A. The Request and The CITY's Response…….…...……1

B. The Petition, The Amended Petition, and The Writ……...…...……..2

C. Production of Additional Responsive Records…….……..3

D. The Response, The Reply, and The Final Order……...……...……5

SUMMARY OF ARGUMENT…….6

ARGUMENT……...……..7

I. STANDARD OF REVIEW……...…7

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO HOLD A HEARING ON THE CONTESTED ISSUE OF WHETHER CITY HAD PROVIDED ALL RESPONSIVE RECORDS...…….....…...7

A. McDonough Expressly Contested CITY's Affirmative Defense of "Compliance."……..9

B. Not Allowing McDonough to Scrutinize and/or cross Examine the CITY's Employees and the Statements Made in the Affidavits Was Highly Prejudicial and Constitutes Reversible Error……11

TABLE OF CONTENTS
(Continued)

Page

III. THE TRIAL COURT ERRED IN FAILING TO HOLD A HEARING ON THE LAWFULNESS OF THE CITY'S ACTIONS.……....13

A. The Amended Petition is an Action for Declaratory Relief…..……16

IV. THE TRIAL COURT ERRED IN FAILING TO HOLD A HEARING TO DETERMINE ENTITLEMENT TO COST OF ENFORCEMENT……17

CONCLUSION…….……...20

CERTIFICATE OF SERVICE……....…….....…21

CERTIFICATE OF COMPLIANCE……..….22

TABLE OF CITATIONS

Page

Cases

American Bankers Life Assurance Co. of Florida v. Williams, 212 So.2d 777 (Fla. 1st DCA 1968)……..……8

City of Homestead v. McDonough, 232 So. 3d 1069, 1072 (3rd DCA 2017)……..8

City of Miami Beach v. Kuoni Destination Management, Inc., 81 So. 3d 530 (Fla. 3d DCA 2012)……..……..……....7

Cookston v. Office of Public Defender, 204 So. 3d 480 (Fla. 5th DCA 2016)…….……..……..……19

D.A. v. Department of Children and Family Services, 84 So. 3d 1136 (Fla. 3d DCA 2012)…….……...8

DePerte v. Tribune Company, 105 S.Ct. 2315 (1985)……..……....15

Ferrier v. Public Defender's Office, Second Judicial Circuit of Florida, 171 So. 3d 744 (Fla. 1st DCA 2015)……...….10

Grace v. Jenne, 855 So. 2d 262 (Fla. 4th DCA 2003)……..……...….12

Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc., 361 So.2d 695 (Fla. 1978)…….……..……..…16

Haines v. Kerner, 404 U.S. 519 (1972)…….……....…..17

Holley v. Bradford County Sheriff's Department, 171 So. 3d 805 (Fla. 1st DCA 2015)…….11

Holly v. Auld, 450 So.2d 217 (Fla. 1984)……8

Hollis v. Massa, 211 So.3d 266 (Fla. 4th DCA 2017)……..……..……..…10

Kline v. University of Florida, 200 So. 3d 271 (Fla. 1st DCA 2016)……...…9

TABLE OF CITATIONS
(Continued)

Page

Lawnwood Med. Ctr., Inc. v. Desai, 54 So. 3d 1027 (Fla. 4th DCA 2011)……7

Lilker v. Suwannee Valley Transit Authority, 133 So. 3d 654 (Fla. 1st DCA 2014)……15,19

Mazer v. Orange County, 811 So. 2d 857 (Fla. 5th DCA 2002)……19

McLaughlin v. State, 721 So. 2d 1170 (Fla. 1998)……8

Polite v. State, 973 So. 2d 1107 (Fla. 2007)……8

Promenade D'Iberville, LLC v. Sundy, 145 So. 3d 980 (Fla. 1st DCA August 28, 2014)……15,19

Puls v. City of Port St. Lucie, 678 So. 2d 514 (Fla. 4th DCA 1996)……14

Rameses, Inc. v. Demings, 29 So. 3d 418 (Fla. 5th DCA 2010)……7

SDE Media LLC v. City of Doral, 25 F.L.W. Supp 243a (Fla. 11th Cir. Ct. May 5, 2017)……20

State v. City of Clearwater, 863 So. 2d 149 (Fla. 2003)……7

State v. McMahon, 94 So. 3d 468 (Fla. 2012)……8

Times Publishing Company v. City of St. Petersburg, 558 So. 2d 487 (Fla. 2d DCA 1990)……15

Tribune Company v. Cannella, 458 So. 2d 1075 (Fla. 1984)……15

Wagner v. Orange County, 960 So. 2d 785 (Fla. 5th DCA 2007)……7

Weeks v. Golden, 764 So. 2d 633 (Fla. 1st DCA 2000)……19,20

Weeks v. Golden, 846 So. 2d 1247 (Fla. 1st DCA 2003)……19

TABLE OF CITATIONS
(Continued)

Page

Williams v. State, 163 So. 3d 618 (Fla. 4th DCA 2015)……..……..…11

Wisner v. City of Tampa Police Department, 601 So. 2d 296
(Fla. 2d DCA 1992)…….....….19

Woodfaulk v. State, 935 So. 2d 1225 (Fla. 5th DCA 2006)…….8

Statutes

§ 86.011, Fla. Stat. …….....16

§ 117.107(12), Fla. Stat. ……..……13

§ 119 *et seq.*, Fla. Stat., "The Florida Public Records Act"……....*passim*

§ 119.07(1)(a), Fla. Stat. ……....…….14

§ 119.11(1), Fla. Stat. …….……..…*passim*

§ 119.12, Fla. Stat. …….……...……...19

§ 119.12(1), Fla. Stat. ……18,19,20

§ 119.12(1)(b), Fla. Stat. ……..18

Other Authorities

Florida Constitution, Art. I, Sec. 24(a), "Government In The Sunshine"…...…...…1

Rule 1.530, *Fla. R. Civ. P.* …….……..5

Rule 1.530(g), *Fla. R. Civ. P.* …….……..5

Rule 1.540(b), *Fla. R. Civ. P.* …….……..5

ABBREVIATIONS USED IN THIS BRIEF

References to appellant/plaintiff, Dr. James Eric McDonough, shall appear as "McDonough."

References to appellee/defendant, City of Homestead, shall appear as the "CITY."

References to CITY Clerk, Elizabeth Sewell, shall appear as "Sewell."

References to Assistant Clerk, Julissa Chavez, shall appear as "Chavez."

References to Police Aide, Paula Carballosa, shall appear as "Carballosa."

References to attorney for CITY, Matthew Mandel, shall appear as "Mandel."

References to CITY Police Officer, Alejandro Murguido, shall appear as "Murguido."

References to the request for public records filed by Dr. McDonough on February 18, 2019, shall appear as the "Request."

References to the Petition for Writ of Mandamus, shall appear as the "Petition."

References to the Amended Petition for Writ of Mandamus, shall appear as "Amended Petition."

References to the order issuing the Alternative Writ of Mandamus, shall appear as the "Writ."

ABBREVIATIONS USED IN THIS BRIEF
(Continued)

References to CITY's Answer and Affirmative Defenses, shall appear as the "Response."

References to Dr. McDonough's Verified Response in Opposition, shall appear as the "Reply."

References to the Final Order dated April 17, 2019, shall appear as the "Final Order."

References to the Motion for Rehearing or to Vacate the Final Order, shall appear as the "Motion for Rehearing."

References to the Order Denying the Motion for Rehearing dated June 7, 2019, shall appear as the "Order Denying Rehearing."

References to Florida Statute §, shall appear as "FS."

References to the appellant's appendix will cite the page number and the paragraph number if applicable, and shall appear as "[App. p. #, ¶ #]."

INTRODUCTION

This appeal arises from the Final Order dismissing Appellant's Petition for Writ of Mandamus entered on April 17, 2019. The Final Order dismissed the action in favor of the CITY, an action specifically seeking declaratory relief in addition to other forms of relief. The Final Order departs from the essential requirements of Florida law in that it was entered by the trial court *sua sponte* without a hearing, which violates the plain language of FS. 119.11(1).

STATEMENT OF THE CASE AND FACTS

A. The Request and The CITY's Response.

On February 18, 2019, pursuant to Art. I, Sec. 24(a) of the Florida Constitution and the Florida Public Records Act, FS. 119 *et seq*., McDonough sent his written request for records (the "Request"), at issue in this case, directly from his email to the email address prominently posted in the Clerk's Office for the filing of public records requests. [App. p. 18 and 23].

The Request states:

> "I am requesting **all records, documents, leave slips, etc. ad infinitum related to any leave taken by Murguido** between April 9th, 2013 and April 9th, 2015. This includes sick leave, vacation leave, holiday leave, administrative leave and comp time. Also requested is any leave or travel for training or any other official reason."

On February 19, 2019, the CITY's assistant clerk, Chavez, responded acknowledging the Request, which was then forwarded to the police investigative aide, Carballosa. [App. p. 20 and 307, ¶ 5].

On February 20, 2019, a "first set" of records were retrieved, in fifteen (15) minutes,[1] and printed by Carballosa, but not promptly produced. [App. p. 312, ¶ 6].

B. The Petition, The Amended Petition, and The Writ.

The Petition was filed and served on March 8, 2019, fourteen (14) business days after submitting the Request in writing. [App. p. 5-9].

On March 11, 2019, Sewell followed up with Carballosa concerning the Request, Carballosa forwarded the previously retrieved first set of records to Sewell, who then turned them over to McDonough. [App. p. 308, ¶ 8-9 and p. 313, ¶ 7].

The CITY attempted to consider this first set of records fully responsive to the Request, though at the time it had only provided nineteen (19) of the two-hundred eighteen (218) pages produced to date. Whereas, more records are reasonably believed to still exist unproduced at this time. McDonough also filed a Motion for Immediate Hearing. [App. p. 10-11].

Thereafter, attorney Mandel refused to confer on a hearing date, while asserting that all records had been provided and claiming the Petition was moot, when in fact all records were not produced. [App. p. 228].

On March 12, 2019, McDonough filed the Amended Petition which acknowledged that responsive records had been provided by the CITY,[2] but

[1] The time-stamps reflect the work beginning at 10:44:22 am and ending at 10:59:37 am, but including a ten-minute pause (10:48:14 am to 10:58:45 am) [App. p. 28-45].

[2] It was not until after filing Amended Petition that it became apparent that CITY had only provided a fraction of the non-exempt records responsive to the Request.

specifically requested Appellee be required to prove, i.e. justify, the reasonableness of its delay. [App. p. 12-16; p. 14, ¶ 10; and p. 15, ¶ 20].

On March 13, 2019, the trial court entered the Writ based upon the Amended Petition, which directed CITY to provide its written defense within twenty (20) days from date of service. The Writ additionally stated that, after CITY filed its defense, the trial court would "schedule an immediate hearing as required by section 119.11(1), Florida Statutes." [App. p. 47].

C. Production of Additional Responsive Records.

On March 13, 2019, McDonough emailed the clerk, Sewell, informing her that not all responsive records had been produced. [App. p. 51-52].

On March 15, 2019, Sewell emailed McDonough a new, distinct set ("second set") of responsive records, which read in part, "The **remaining responsive records** are in the below dropbox link." [App. p. 51].

Sewell followed up with more emails to McDonough, who continued to request in writing that Sewell produce all remaining records responsive to the Request. In an email sent March 21, 2019, almost two weeks after the Petition had been filed with the court, Sewell for the first time claimed a statutory exemption to disclosure of a public record in CITY's possession, while providing another new and distinct set ("third set") of responsive documents. [App. p. 210 and 212-222]. The email stated in part:

> "**Attached are additional records responsive** to your public records request dated February 18, 2019… **Also, additional responsive records**, in the form of doctors' notes required to substantiate medical leave requests, **have been withheld as confidential and exempt from disclosure** pursuant to…"

On March 26, 2019, McDonough emailed Sewell regarding records which CITY again failed to produce (i.e., incident and accident reports for workers compensation claim). Sewell emailed McDonough yet another new distinct set ("fourth set") of responsive documents as a result, while claiming the incident and accident reports were not part of the leave process and were therefore not responsive to the Request.[3] [App. p. 253].

On March 28, 2019, in response to McDonough's vehement protest that the documents turned over were not fully responsive, Sewell finally provided yet still another new, distinct set ("fifth set") of responsive records, consisting of the incident and accident reports. [App. p. 270 and 272-295].

In total, CITY produced five sets of responsive records to McDonough, with novel and distinct records in every batch. The CITY produced the additional sets of records only after McDonough's repeated complaints about CITY's failure to produce records. Furthermore, whether CITY has produced all non-exempt records responsive to the Request remains a contested issue. McDonough was forced to file and serve Notices of Filing for each new set of documents produced after filing the

[3] McDonough asserts the incident and accident reports are required by policy and law; and are necessarily related to the workers compensation leave taken by Murguido and that they are therefore responsive to the Request.

Amended Petition (First, Second, Seventh, and Eighth Notices) [App. p. 48-49, 207-208, 250-251, and 267-268], and Notices of Filing for other evidence essential to the equitable relief - mandamus, declaratory and/or injunctive - sought (Third, Fourth, Fifth, and Sixth Notices). [App. p. 223-224, 230-231, 239-240, and 246-247].

D. The Response, The Reply, and The Final Order.

On April 2, 2019, CITY filed its Response and attached the Sewell and Carballosa Affidavits. The CITY's Response alleged that it had produced all responsive non-exempt records in its possession [see for example App. p. 302, ¶ I]. Glaringly, however, CITY's attached affidavits failed to state the same.

On April 3, 2019, Plaintiff filed his Reply which alleged that CITY: a) had not provided all responsive non-exempt records [App. p. 316-317]; b) had no reasonable justification for the delays therein [App. p. 317-318]; and c) was responsible for McDonough's reasonable cost of enforcement [App. 318-319].

Nonetheless, the trial court proceeded to enter a Final Order *sua sponte* on April 17, 2019, dismissing the action in favor of CITY based solely on its affirmative defense of "compliance" in which they alleged production of all responsive records, and absent of a statutorily required hearing. [App. p. 324-326].

On April 24, 2019, McDonough filed and served a Motion for Rehearing, under Rules 1.530(g) and 1.540(b), *Fla. R. Civ. P.* [App. p. 327-336].

On June 7, 2019, the trial court entered an Order Denying Rehearing without a hearing, and acknowledged the timeliness under Rule 1.530. [App. p. 337-338].

SUMMARY OF ARGUMENT

The trial court committed reversible error when it dismissed McDonough's lawsuit without holding an evidentiary hearing as required by FS. 119.11(1). No lawful provision exists that allows the dismissal of a records request lawsuit filed to enforce provisions of FS. 119 *et seq*. prior to an evidentiary hearing; which is essential to determine whether: a) any non-exempt responsive records remain unproduced; or whether b) an unlawful refusal of access to public records exists; and/or whether c) the plaintiff should be entitled to reasonable cost of enforcement.

The absence of any sworn statements that demonstrate all non-exempt responsive records were provided, is at odds with the CITY's own pleadings and McDonough's sworn and/or verified statements which indicate the responsive records had not been provided, coupled with *prima facie* evidence which are demonstrable violations of FS. 119 *et seq*.

Further, the trial court does not have jurisdiction and/or statutory authority to carve out its own exceptions to the requirements for an evidentiary hearing as set forth in FS. 119.11(1). In doing so, the trial court abused its discretion *per se*, and violated the rule which prohibits courts from extending or modifying the express terms of a statute. Prevailing Florida law states that trial courts are without power to construe an unambiguous statute in a way which would extend, modify or limit its express terms or its reasonable and obvious implications. Doing so would amount

to an impermissible abrogation of legislative power. To this end, McDonough's case must be reversed and remanded to the trial court for an evidentiary hearing.

ARGUMENT

I. STANDARD OF REVIEW.

The issue in this public records litigation involves a matter of statutory construction and is a question of law. *See Rameses, Inc. v. Demings*, 29 So. 3d 418 (Fla. 5th DCA 2010) (citing *Wagner v. Orange County*, 960 So. 2d 785 (Fla. 5th DCA 2007)). As such, because "a legal principle is involved, the standard of review is de novo. *City of Miami Beach v. Kuoni Destination Management, Inc.*, 81 So. 3d 530, 532 (Fla. 3d DCA 2012) (citing *Lawnwood Med. Ctr., Inc. v. Desai*, 54 So. 3d 1027 (Fla. 4th DCA 2011)); *see also State v. City of Clearwater*, 863 So. 2d 149, 151 (Fla. 2003) (stating where purely legal issues of whether a document is a public record and subject to disclosure are involved, the proper standard is de novo review).

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO HOLD A HEARING ON THE CONTESTED ISSUE OF WHETHER CITY HAD PROVIDED ALL RESPONSIVE RECORDS.

An evidentiary hearing is required to determine if CITY produced all non-exempt records responsive to McDonough's Request, as required by the statute.

FS. 119.11(1) states:

> "Whenever an action is filed to enforce the provisions of this chapter, **the court shall set an immediate hearing**, giving the case priority over other pending cases."

In an unrelated case between the same parties vis-à-vis McDonough and the CITY, the trial court was previously overturned by the Third District Court of Appeals for attempting to carve out its own exception to the statute, which appears to have again happened in the instant appeal. Therein, the Third District held:

> "As much as judges, both trial court and appellate, would like to carve out such an exception to help expedite the case, we cannot do so. Florida courts are 'without power to construe an unambiguous statute in a way which would extend, modify or limit its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power.'" *City of Homestead v. McDonough*, 232 So. 3d 1069, 1072 (3rd DCA 2017) (quoting *Holly v. Auld*, 450 So.2d 217, 219 (Fla. 1984)); *American Bankers Life Assurance Co. of Florida v. Williams*, 212 So.2d 777, 778 (Fla. 1st DCA 1968); *State v. McMahon*, 94 So.3d 468, 472–73 (Fla. 2012); *McLaughlin v. State*, 721 So.2d 1170, 1172 (Fla. 1998).

Instead, "[w]here the statute's language is clear or unambiguous, courts should give such language its plain meaning." *D.A. v. Department of Children and Family Services*, 84 So. 3d 1136, 1139 (Fla. 3d DCA 2012) (citing *Polite v. State*, 973 So. 2d 1107, 1111 (Fla. 2007)).

In the instant action, McDonough filed a petition with the court, and then filed Motion for Immediate Hearing, and there are no further requirements to obtaining such a hearing other than the filing itself.[4] [App. p. 10-11]. The plain language of the statute in question, FS. 119.11(1) states that the trial court "shall" set an immediate hearing, which indicates that it is a non-discretionary ministerial duty of

[4] *Woodfaulk v. State*, 935 So. 2d 1225 (Fla. 5th DCA 2006) (FS. 119.11(1) does not place specific requirements on a party requesting public records to obtain an accelerated hearing except the filing of an action to enforce the public records law).

the judge to set the hearing. However, this mandatory duty was disregarded by the trial court which previously noted such a hearing was required by law. [App. p. 47].

Nevertheless, McDonough's lawsuit was dismissed, [App. p. 324-325], without considering that McDonough raised meritorious dispute as to whether CITY had unlawfully delayed production of records and whether CITY had produced all responsive records to the Request which was demonstrated *inter alia* within the rebuttal of his Reply. [App. p. 317-318].

Hence it was an abuse of discretion *per se* for the trial court to abrogate from the statute and fail and/or refuse to docket an evidentiary hearing prior to dismissing McDonough's lawsuit.

A. McDonough Expressly Contested CITY's Affirmative Defense of "Compliance."

The trial court incorrectly stated in its Final Order that "the Litigants do not dispute that the City provided the non-exempt records on March 11, 2019." [App. p. 324]. However, the second, third, fourth and fifth sets of records demonstrate that factual issues remain and that NOT all responsive non-exempt records were provided on March 11, 2019.

To this end, the purpose of the evidentiary hearing would be "to allow the court to hear argument from the parties and resolve any dispute as to whether there are [remaining] public records responsive to the request and whether an exemption from disclosure applies in whole or in part to the requested records." *Kline v. University of Florida*, 200 So. 3d 271 (Fla. 1st DCA 2016). "Where there is a

contested issue regarding whether an official is in possession of the requested materials, it is error for a trial court to deny a petition for writ of mandamus without conducting an evidentiary hearing." *Hollis v. Massa*, 211 So.3d 266, 268 (Fla. 4th DCA 2017). The trial court erred in not conducting an evidentiary hearing "on the contested issue of whether [the agency] had the requested materials in its possession." *Ferrier v. Public Defender's Office, Second Judicial Circuit of Florida*, 171 So. 3d 744 (Fla. 1st DCA 2015).

In the instant case, (regardless that the trial court failed to recognize McDonough's position on the remaining issues), both parties are unequivocally in dispute about whether all responsive non-exempt records have been turned over to McDonough — to date. McDonough argued on Reply that:

> "Defendant begins its argument claiming that it cannot be disputed that all non-exempt, non-confidential records responsive to Plaintiff's request have been produced. Yet, Plaintiff unequivocally disputes such claim." [App. p. 316-317].

The allegations in CITY'S Response disingenuously purport the attached affidavits provide a sworn factual basis which somehow demonstrates that all responsive non-exempt records were provided to McDonough. These allegations are unsupported because cursory review of the affidavits show that such sworn statements, alleging all records in possession of CITY were produced, do not exist. [App. p. 307-314].

Foreclosing on McDonough's statutory and constitutional right to a hearing, as a result of dismissing his lawsuit, was extremely prejudicial and a reversible error.

B. Not Allowing McDonough to Scrutinize and/or cross Examine the CITY's Employees and the Statements Made in the Affidavits Was Highly Prejudicial and Constitutes Reversible Error.

The only allegation(s) that all responsive non-exempt records in possession of CITY were provided is in its unsworn pleadings. [see for example App. p. 302, ¶ I].[5] Opposing counsel signed the signature block of said pleading and thus asserted that he researched the law and facts and had a good faith basis to believe the CITY signed affidavits which demonstrated employees for CITY made sworn statements to the effect that all responsive documents in possession of the CITY were turned over to McDonough. Had McDonough been granted an evidentiary hearing by the trial court, he would have had an opportunity to demonstrate the glaring falsities and the conflicts between opposing counsel's averments and the sworn statements within CITY's Affidavits.

Due to this dispute over the "unsworn claim that it did not possess the requested records, the trial court could not deny [the] petition without conducting an evidentiary hearing on this issue." *Holley v. Bradford County Sheriff's Department*, 171 So. 3d 805 (Fla. 1st DCA 2015); *see also Williams v. State*, 163 So. 3d 618 (Fla. 4th DCA 2015) (trial judge erred by denying petition for writ of mandamus without issuing an alternative writ to show cause and failing to hold an evidentiary hearing to resolve disputed issues of fact). "Although the [agency] may ultimately not be

[5] Pleadings drafted by lawyers do not constitute evidence in the form of sworn testimony/statements or factual evidence.

able to retrieve these records, because of their age or another reason, the order in this case, entered without an evidentiary hearing, was premature." *Grace v. Jenne*, 855 So. 2d 262, 263 (Fla. 4th DCA 2003).

CITY's pleadings erroneously and solely relied upon the Sewell and Carballosa Affidavits in support of its "compliance defense." For example, the Sewell Affidavit does NOT allege that all non-exempt responsive records in the possession of CITY were produced. It merely states the records provided to Sewell by Carballosa and the finance department were produced [App. p. 310, ¶¶ 20-21]. There is no mention of other departments being contacted, departments which would likely also possess responsive records such as Human Resources, nor is there any affirmative statement that all records in possession of CITY have been produced. Hence the Sewell Affidavit does nothing to resolve the issue and is a non-starter for purposes of an affirmative defense of "compliance."

Likewise, the Carballosa Affidavit only alleges that all records in possession of the police department were provided, [App. p. 313, ¶ 13], but does nothing to reconcile whether the other departments vis-à-vis (i.e., Human Resources, Information Technology, etc.) within the CITY maintained responsive records. As such, McDonough was not afforded the opportunity to cross-examine/scrutinize or obtain under oath – discovery statements to assist with his rebuttal of the falsities and the conflicting statements between the pleadings and the affidavits.

Moreover, the assistant clerk, Chavez, who notarized the Sewell Affidavit,

[App. p. 311], was a party to the underlying transaction in violation of FS. 117.107(12) which states in pertinent part:

> "A notary public may not notarize a signature on a document if the notary public has a financial interest in or is a party to the underlying transaction..."

Because Chavez was the employee who initially responded to the Request, she should have been barred from affixing her notarial signature to anything related to the Request for records made by McDonough. [App. p. 20]. Chavez, Sewell and Mandel all should have respectively known this was improper.

An evidentiary hearing should have been held based on these disputes among others to determine whether the unsworn allegations advanced by CITY were meritorious and/or in bad faith preceding any final judgement in this case.

III. THE TRIAL COURT ERRED IN FAILING TO HOLD A HEARING ON THE LAWFULNESS OF THE CITY'S ACTIONS.

To the extent, assuming arguendo, that CITY produced all non-exempt responsive records, the trial court must also determine if the delay in production was justified, i.e. lawful.

Thus, it was an abuse of discretion *per se* for the trial court to dismiss the action without first holding an evidentiary hearing to consider and/or make a determination/declaration on whether CITY's delay in the initial production of records was, indeed, in violation of Florida law.

Initially, CITY retrieved what it considered to be the responsive non-exempt records within two days of the filing of the Request. [App. p. 312, ¶¶ 4 and 6].

That first set of records were retrieved in fifteen (15) minutes time with only five (5) minutes of computer work as shown by the time stamps of the records and required no review to delete any portions thereof as they were not exempt or confidential. [App. p. 28-45]. As no review for exempt or confidential information was necessary, any material delay beyond the time necessary for retrieval is *prima facie* unjustified.

In support of its position, CITY provided no reasonable answer for why the first set of non-exempt responsive records, though immediately retrieved, were not immediately forwarded for production, which should have taken approximately one (1) minute of time. Instead, the records were withheld and not forwarded until approximately three (3) weeks after the records were retrieved and after the filing and service of the instant lawsuit to force production.

Just because the CITY later produced records pursuant to a court action did not moot or invalidate the cause of action and the courts need to examine these issues fully, up to and including a declaration to end the dispute over production between the parties.

FS. 119.07(1)(a) states:

> "Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, **at any reasonable time**, under reasonable conditions, and under supervision by the custodian of the public records."

In *Puls v. City of Port St. Lucie*, 678 So. 2d 514 (Fla. 4th DCA 1996) the court noted "[p]roduction of the records after the [public records] lawsuit was filed did not

moot the issues raised in the complaint," and remanded the case for an evidentiary hearing on whether there was an unlawful refusal of access to public records. *See also Times Publishing Company v. City of St. Petersburg*, 558 So. 2d 487, 491 (Fla. 2d DCA 1990) (while courts do not ordinarily resolve disputes unless a case or controversy exists, "since the instant situation is capable of repetition while evading review, we find it appropriate to address the issues before us concerning applicability of the Public Records Act for future reference").

In examining the lawfulness of the CITY's response time, the Florida Public Records Act does not set forth a specific time frame for compliance but imposes a mandatory duty of good faith response in a reasonable amount of time.

A "delay in making public records available is permissible under very limited circumstances." The only delay in producing records permitted under the Florida Public Records Act, "is the limited reasonable time allowed the custodian to retrieve the record and delete those portions of the record the custodian asserts are exempt." *Promenade D'Iberville, LLC v. Sundy*, 145 So. 3d 980, 983 (Fla. 1st DCA August 28, 2014), citing *Tribune Company v. Cannella*, 458 So. 2d 1075, 1078 (Fla. 1984), appeal dismissed sub nom., *DePerte v. Tribune Company*, 105 S.Ct. 2315 (1985). *Lilker v. Suwannee Valley Transit Authority*, 133 So. 3d 654, 655 (Fla. 1st DCA 2014) (where delay is the issue, the court must determine whether the delay was justified under the facts of the case).

A. The Amended Petition is an Action for Declaratory Relief.

The Amended Petition should have been construed as an action for declaratory relief, even if it was styled as mandamus.

The Amended Petition specifically, even if not explicitly, sought declaratory relief by requesting "an order to show cause or alternatively a writ of mandamus directed to CITY, requiring CITY to prove the reasonableness of its delay." [App. p. 15, ¶ 20].

The Amended Petition also requested a determination of entitlement to reasonable cost of enforcement; and such other relief as was just and proper under the circumstances. [App. p. 15, ¶ 22 and last paragraph].

One may simultaneously seek mandamus and declaratory relief. *Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc.*, 361 So.2d 695 (Fla. 1978). FS. 86.011, authorizing declaratory relief, states that "any person seeking a declaratory judgment may also demand additional, alternative, coercive, subsequent, or supplemental relief in the same action."

As such, McDonough should have been able to seek declaratory relief in addition to his request for mandamus. *Gulf Pines*, 361 So.2d at 699. Otherwise, the plain language of the statute would be eviscerated. Florida courts and the legislature support the policy that the declaratory judgment statute should be liberally construed. *Id*. Additionally, *pro se* filings are to be held to less stringent standards

than formal pleadings drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519, 520-521 (1972).

The trial court ordered CITY to provide written responses specifically to the Amended Petition, and stated that afterwards it would set an immediate hearing, but failed to do so. [App. p. 47].

CITY never justified the above delay(s) or its repeated failures to produce all non-exempt responsive records, or its misrepresentations of full production. Instead, both CITY and the trial court focused on the unsworn, and disputed, allegation that "all responsive records had been produced" which effectively denied McDonough any form of equitable or further relief. [App. p. 325].

The Amended Petition amended the initial Petition which only asked for mandamus to force production of records and cost. [App. p. 8, ¶¶ 24 and 26]. Whereas, the Amended Petition additionally sought a determination/declaration of the lawfulness of the delay(s). [App. p. 15, ¶ 20].

Therefore, it was an abuse of discretion *per se* for the trial court to fail to liberally construe the *pro se* Amended Petition as an action for declaratory relief and dismissing the Amended Petition before holding an evidentiary hearing.

IV. THE TRIAL COURT ERRED IN FAILING TO HOLD A HEARING TO DETERMINE ENTITLEMENT TO COST OF ENFORCEMENT.

In the instant action, McDonough filed a valid request providing written notice identifying the Request to the CITY'S custodian of public records fourteen

(14) business days before filing the instant action, substantially more than the five (5) days required by FS. 119.12(1)(b). Further, a *prima facie* case has been made demonstrating a pattern of at least two specific types of unlawful violations (delay and affirmative refusal) of FS. 119 *et seq.,* made by CITY. As previously stated, CITY has failed to provide any factual underpinning in the form of sworn testimony and/or any evidence which would justify these *prima facie* violations. The trial court should have determined whether reasonable costs to enforce McDonough's action was applicable and justified.

An evidentiary hearing is still necessary even if all non-exempt responsive records were produced because the trial court has not yet determined whether *pro se* Plaintiff is entitled to the reasonable cost of enforcement including among others filing, printing and service of process cost.

FS. 119.12(1) states:

> "If a civil action is filed against an agency to enforce the provisions of this chapter, **the court shall assess and award the reasonable costs of enforcement**, including reasonable attorney fees, against the responsible agency **if the court determines that**:
>
> (a) **The agency unlawfully refused to permit a public record to be inspected or copied; and**
>
> (b) **The complainant provided written notice identifying the public record request to the agency's custodian of public records at least 5 business days before filing the civil action**, except as provided under subsection (2). The notice period begins on the day the written notice of the request is received by the custodian of public records, excluding Saturday, Sunday, and legal holidays, and runs until 5 business days have elapsed."

"[U]njustified failure to respond to a public records request until after an action has been commenced to compel compliance amounts to an unlawful refusal" for purposes of FS. 119.12. *Weeks v. Golden*, 764 So. 2d 633 (Fla. 1st DCA 2000). "Unlawful refusal under section 119.12 includes not only affirmative refusal to produce records, but also unjustified delay in producing them." *Lilker*, 133 So. 3d at 655 (Fla. 1st DCA 2014). An agency's "production of the records on the eve of the enforcement hearing did not cure its unjustified delay." *Promenade*, 145 So. 3d at 984 (Fla. 1st DCA 2014). "[T]he fact that the requested documents were produced in the instant case after the action was commenced, but prior to final adjudication of the issue by the trial court, does not render the case moot or preclude consideration of entitlement to [costs and] fees under the statute." *Mazer v. Orange County*, 811 So. 2d 857, 860 (Fla. 5th DCA 2002). *See also Cookston v. Office of Public Defender*, 204 So. 3d 480, 483 (Fla. 5th DCA 2016) (reversing dismissal of public records case and remanding for determination of whether there was an unlawful refusal warranting an award of the reasonable costs of enforcement under section 119.12(1)).

Further, it is well established that a successful *pro se* litigant may recover his reasonable costs, under FS. 119.12(1). *Weeks*, 764 So. 2d 633 (Fla. 1st DCA 2000); *Wisner v. City of Tampa Police Department*, 601 So. 2d 296 (Fla. 2d DCA 1992). *See also Weeks v. Golden*, 846 So. 2d 1247 (Fla. 1st DCA 2003) (awarding costs

associated with postage, envelopes and copying, as well as filing and service of process fees, incurred by *pro se* plaintiff who prevailed in public records lawsuit).

To the extent CITY willfully perpetrated *prima facie* transgressions of the Florida Public Records Act at least when it: 1) repeatedly delayed producing non-exempt responsive records until after the filing of suit and repeated demands for all responsive records, *Weeks*, 764 So. 2d 633; and 2) repeatedly misrepresented that it had provided all non-exempt responsive documents, *SDE Media LLC v. City of Doral*, 25 F.L.W. Supp 243a (Fla. 11th Cir. Ct. May 5, 2017).[6]

Therefore, it was an abuse of discretion *per se* for the trial court to dismiss McDonough's lawsuit without first holding an evidentiary hearing to determine if he was entitled to his reasonable cost of enforcement, under FS. 119.12(1).

CONCLUSION

The trial court committed reversible error when it dismissed the instant case without first conducting an evidentiary hearing to determine if: a) any non-exempt responsive records remain unproduced; b) there was an unlawful refusal(s) of access to public records (through unjustified delay, through misrepresentation, and through affirmative refusal to provide records); and c) plaintiff is entitled to his reasonable cost of enforcement. The trial court violated the rule prohibiting courts from

[6] CITY violated the Public Records Law by "misrepresenting to [McDonough] that all responsive records had been located and produced when, in fact, [CITY] knew that a good faith search had not been made and that additional responsive records may not have been produced". *SDE*, 25 F.L.W. Supp 243a.

extending or modifying the express terms of a statute by creating its own "exception" to the requirements of FS. 119.11(1), which mandates an immediate hearing whenever an action is filed to enforce provisions of the Florida Public Records Act.

WHEREFORE, McDonough respectfully requests that this Court reverse the trial court's Final Order dismissing the case, remand the case back for an evidentiary hearing in the trial court; and any other relief as this Court deems proper and just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief has been served by email on counsels for Defendant, Matthew Mandel at MMandel@WSH-law.com, Samuel Zeskind at SZeskind@wsh-law.com, and Matthew Pearl at mpearl@wsh-law.com, as well as City Clerk Elizabeth Sewell at ESewell@cityofhomestead.com on this 18th day of July 2019.

Dr. James Eric McDonough, *pro se*

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

Dr. James Eric McDonough, *pro se*